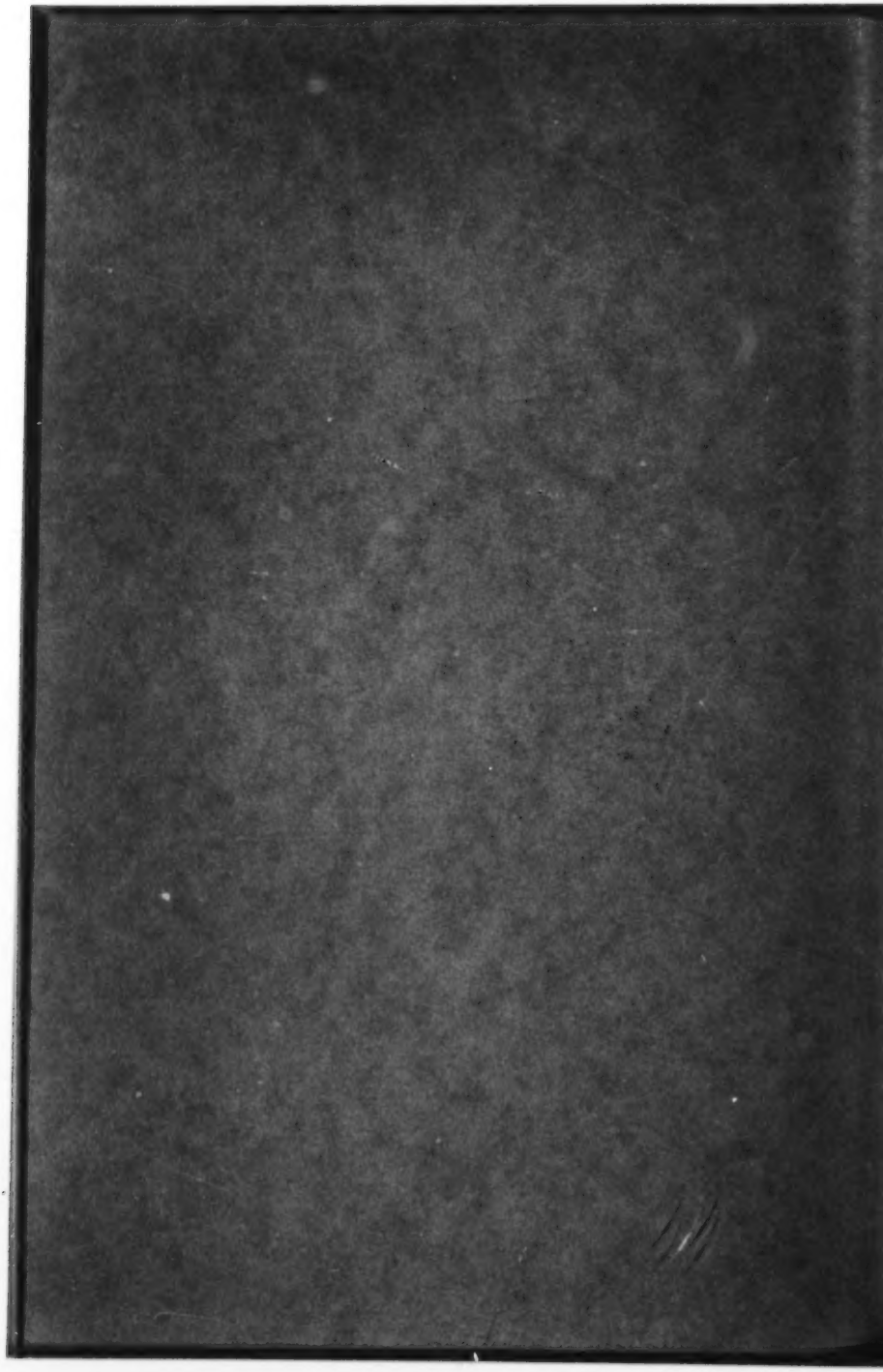

APPENDIX

The petition cites a number of cases in alleged support of its contention that before a carrier may invoke the protection of a bill of lading clause, it must prove the seaworthiness of the vessel in all respects, even though it has proved that the loss was occasioned by an excepted cause, the cause being other than unseaworthiness, and that the carrier was guilty of no negligence causing the loss. The cited cases do not so hold. We briefly digest the cases here.

Bradley Fertilizer Co. v. The Edwin I. Morrison, 153 U. S. 199, 38 L. Ed. 688, was a suit brought under a charter party. The opinion notes that in the absence of statute or contract there is an absolute warranty of seaworthiness and not merely an obligation to use due diligence. The charter party contained an exception against liability for damage arising from perils of the sea. The holding of the case is merely that such an exception does not exonerate the owner from liability for loss or damage resulting from his own negligence. The evidence showed that the damage was caused by sea water which entered the bilge pump hole because of a missing cap. The absence of the cap being the cause, the question was whether that absence was due to negligence of the ship. The evidence showed that the cap had been carried away in circumstances amounting to an ordinary contingency which ought reasonably to have been anticipated—in other words, not a peril of the sea. The cap had been negligently fitted. The defendant thus had failed to show that the loss was due to a cause within the exception of the charter party.

The Thomas P. Beal, 11 Fed. (2d) 49, was a case of damage to barrels of oil resulting from leakage. The ship relied upon a leakage exception in the bill of lading. The court pointed out that on proof that the cause was one covered by an exception of the bill of lading, the burden is upon the cargo owner to prove that negligence "was the efficient cause". The cargo owner claimed that the cause was improper and negligent stowage of the oil in the hottest part of the ship and that the leakage "was due to the excessive heat in the place of stowage" (p. 52), the leakage in the barrels stowed elsewhere on the ship being entirely normal. The claimed unseaworthiness was nothing else than the improper stowage of the oil in the hottest part of the ship. The court pointed out that the question of improper stowage was important only if it was a proximate cause of the damage, and it said:

> "We are of the opinion that this amounted to negligence, which was the proximate cause of the damage, for which * * * the carrier is liable". (p. 51, 2d col.)

It further points out that unseaworthiness is unimportant unless it is a proximate cause:

> "Whose negligence was the efficient cause of the damage? Negligence of the carrier is not actionable unless it caused the damage". (p. 51, 1st col.)

The Benjamin Noble, 232 Fed. 382. The vessel was lost—ship, crew and cargo—during a storm. The cargo owners sought recovery on the theory that the ship was unseaworthy because she was overloaded. The unseaworthiness in question was the direct cause of the loss. Petitioners cite the same case on appeal, 244 Fed. 95. The

evidence having showed that carrier did not exercise due diligence in loading the ship, its negligence being therefore the cause of the loss, the court merely remarked that the bill of lading was no defense, not because of Section 3 of the *Harter Act* but because Section 2 of the Act prohibits a contract which would excuse the carrier from its own negligence.

The Skipsea, 9 Fed. (2d) 887. Here a cargo of onions was damaged in two ways. They were stowed next to a wooden bulkhead separating them from the coal bunkers, and part was damaged by leakage of bilge water through the coal and into the hold through the leaky bulkhead. The proven cause was the unseaworthy bulkhead. Other onions were found smashed as a result of the fact that the cargo had not been shored in place, allowing some of the boxes to fall off and break. The court said:

> "The result of this combination of water mixed with coal dust explains the damage to the onions found in the hold * * * The ship would be liable for damages resulting from this cause."

As to the smashed onions, the court said:

> "The ship has not satisfactorily explained the cause of the damage here, and we are satisfied that the cargo stowed was not properly secured."
>
> * * * * * * *
>
> "The loss through breakage was due to the shifting cargo and this is attributable to the negligent manner of stowing the cargo."

Kaufer Co. v. Luckenbach Steamship Company, 294 Fed. 978, involved damage to candles caused by heat. The

seaworthiness of which the court speaks was proper stowage, i.e., stowage "such as to reasonably fit her to carry the cargo undertaken". The issue was whether the candles were stowed near the engine room or steam pipes or other hot object. Whether the burden of proof on this issue was on the shipper or carrier is unimportant in the present case. The point in the *Kaufer* case is that the unseaworthiness involved was one having a direct causal effect on the damage.

Cafiero & Mencacci v. Navigazione Libera Triestina, S. A., 50 Fed. (2d) 199, involved damage to canned tomatoes which resulted from the fact that cheese had been improperly stowed on top of them and during the voyage melted and ran over the tomatoes. The seaworthiness involved pertained to stowage, over other cargo, of cheese, a material likely to melt. The stowage was held to be negligent and the court found "the damage due to negligence". The unseaworthiness was the direct cause of the damage.

American Co. v. U. S., 26 Fed. (2d) 468. Here shortly after the ship commenced its voyage its steering gear became jammed because of a short and loose key in the steering mechanism, and she became unmanageable, collided with another vessel and sank. The defect in the gear was readily discoverable by due diligence. The specific proved unseaworthiness and the lack of due diligence to make seaworthy were the cause of the loss. Since negligence was the cause, the carrier was liable despite any provision of the bill of lading. We quote (p. 469):

> "There can be no doubt that a loose key in one of the sets of gears connected with the steering mechanism

was the cause of the jamming. * * * This key was short and therefore loose. This defective key must have been apparent if due diligence had been exercised by inspection, as competent and convincing witnesses have testified * * *

* * * * * * *

"Respondent also contends that there is no causal connection between the unseaworthiness of the ship and the loss. The collision was due solely to the fact that the ship was unmanageable practically from the start, owing to the defective jammed steering gear. * * * (p. 470, 1st col.)

* * * * * * *

"The respondent offers no explanation of the jamming of the wheel, but seems to be content to rest on the position that the collision was inevitable accident. But the cause of the collision is known; i.e., the defective (unseaworthy) steering gear, undiscovered owing to failure of the owner to exercise due diligence. The resultant damage to cargo is the logical sequence" (p. 470, 2d col.)

It will be noted that the carrier itself offered no explanation of the jamming, whereas in the present case the respondent fully proved the cause of the loss. The case does not hold that in order to rely on a bill of lading exception the carrier must prove seaworthiness with respect to matters not causally connected with the damage. It is only another illustration of the conceded rule that a carrier always is liable for loss resulting from its negligence.

Blake, Moffitt & Towne v. Steamship Co., 120 Cal. App. (Supp.) 775, was a decision of the appellate division of

the Superior Court (nisi prius court) of San Francisco on appeal from the Municipal Court and involved a defense under Section 3 of the *Harter Act*. The words "bill of lading" appear in the passage quoted on page 21 of the petition as dictum unsupported by any authority.